CLARK COUNTY BOARD OF COMMISSIONERS
PUBLIC HEARING – EAST COUNTY RECLAMATION REMAND
AUGUST 26, 2003

The Board convened in the Commissioners' Hearing Room, 6th Floor, Public Service Center, 1300 Franklin Street, Vancouver, Washington. Commissioners Morris, Stanton, and Pridemore, Chair, present.

PRIDEMORE: We'll bring this meeting of August 26th to order. Before we begin, I'd like to respectfully request that that sign in the back please be removed. Whoever brought the sign, if you could please remove it. Thank you.

We begin this morning with the Pledge of Allegiance. Would you join us all.

(PLEDGE OF ALLEGIANCE)

PRIDEMORE: Starting this morning is Public Comment. Is there anyone in the room who wishes to speak to the Board on any manner other than the appeal hearing later? Anyone wish to speak to the Board this morning? Very well, I'll close public comment and move onto the Consent Agenda. Questions?

MORRIS: I have no questions.

PRIDEMORE: I had a question. Bill, I don't know if you can answer this, but the first three items all had to do with additional costs to the 149th Street. Do we have a reason for wanting… this is –

BILL BARRON: – I'm sorry sir, what?

PRIDEMORE: It's about twenty thousand dollars more to be spent on 149th Street planning and site –

BARRON: I don't know. I can have somebody from Public Works – I can find out.

PRIDEMORE: I'd appreciate that.

BARRON: Do you want to pull those?

PRIDEMORE: No reason to pull them, but it would be nice to know what's causing that increase in cost.

BARRON: I'll see that your question is answered.

PRIDEMORE: Questions?

STANTON: The only thing I have is, before the vote, I want to note that I will abstain from approval of the minutes from the twelfth of August as I was not here. That's in number eight.

MORRIS: Do you want to pull that out?

PRIDEMORE: Yeah, let's pull that out and do a separate vote.

MORRIS: Okay, Mr. Chairman, I move approval of consent agenda items one through eleven and number thirteen.

STANTON: I think it's one through thirteen.

MORRIS: Which one is it that you want to withdraw?

STANTON: I pulled number eight for separate consideration and that leaves us one through thirteen.

MORRIS: One through seven and nine through thirteen.

PRIDEMORE: Is there a second?

STANTON: Second.

PRIDEMORE: It's moved and seconded to approve consent agenda items one through seven and nine through thirteen. All those in favor?

MORRIS: Aye.

STANTON: Aye.

PRIDEMORE: Aye. Opposed? Motion passes. Action on number eight?

MORRIS: Mr. Chairman, I move approval of consent agenda item number eight.

PRIDEMORE: Second. It's moved and seconded to approve consent agenda item number eight. All those in favor?

MORRIS: Aye.

PRIDEMORE: Aye. Opposed? Motion passes.

We are going to adjourn briefly as the Board of County Commissioners and convene as the Clark County Board of Health. The only item on the agenda for the Board of Health today are three items on the Consent Agenda.

MORRIS: Mr. Chairman, I move approval of the Consent Agenda.

STANTON: Second.

PRIDEMORE: It's moved and seconded to approve consent agenda items one through three. All those in favor?

STANTON: Aye.

MORRIS: Aye.

PRIDEMORE: Aye. Opposed? Motion passes.

We will now adjourn as the Board of Health and reconvene as the Clark County Board of Commissioners to consider a land use appeal on East County Reclamation Center. We'll take just a moment to change books.

MORRIS: Well, and, Mr. Chairman I thought I had Exhibit 41 in this stack and I do not and I have to get. So, if you would excuse me.

PRIDEMORE: Yes, ma'am. Oh, folks, I appreciate it, but this is a quasi-judicial hearing and I'm going to have to ask you, respectfully, if you would please either remove the outfits – I'll have to ask you to leave. You can't be – we can't have any distractions. Maybe I'd clarify for everybody in the room that the Board in this capacity operates at a quasi-judicial role. We operate very much like a court. We don't receive public testimony and we don't accept new evidence into the record. Thank you.

MORRIS: Mr. Lowry, I left you two voice mails last night. In one of them I used one exhibit number; in another I used the second exhibit number. Do you remember the number of the second one?

LOWRY: Forty-one.

MORRIS: That was forty-one. Thank you.

PRIDEMORE: Exhibit forty-one is not in my book.

MORRIS: It's not in the book. It was not requested by anyone.

LOWRY: Yeah, but it is obviously in the primary record.

PRIDEMORE: We'll begin this morning with certification that we've read the record.

STANTON: Mr. Chairman, I've read the pertinent parts of the record. I watched the videotape of the November 8th hearing.
MORRIS: Mr. Chairman, I have read the vast majority of the record. I have not read it all. I have read those exhibits that were referenced by legal council when Mr. Lowry asked them to submit their list of relevant exhibits. Some of those exhibits led me to other exhibits which were not on their list, so I don't have a delineation of which ones I have read, but I have read too many. And also I have watched the videotape, but that was weeks ago and there are parts of it that I no doubt will not remember.

PRIDEMORE: I have read the record – the pertinent parts of the record – and viewed the videotape.

STANTON: Before we get too far into this I would like to make a disclosure and I don't know how significant it is, but in both of my campaigns in 1996 and in 2000 I did receive generous contributions from the applicant and from his attorney. Actually, I'm looking back through my own records; I've also received some generous contributions from those who I find named at some point in the record from the appellant's side as well.

LOWRY: Just from the standpoint of the (inaudible) statute, campaign contributions are not a basis for disqualification under that document.

STANTON: Thank you.

PRIDEMORE: Okay –
MORRIS: I have other disclosures too that I would like to make. I had intended to talk about campaign contributions, but I suppose if you were to compare Commissioner Stanton's and my PDC's for those years you would find similar entries with similar amounts from very similar people. But there are some other things in addition to that that I believe we need to disclose this morning and I've actually written out some comments that have not been edited and would certainly fail my own scrutiny for grammar and punctuation, but I'm going to struggle through them. It seems appropriate at this time to discuss the context in which we or I come to this appeal today and to make what I believe to be appropriate disclosures about roles the existing Board of County Commissioners has played that may or may not have inescapably influenced our conclusions. First, this appeal has certainly not come to us in a vacuum. We have known about it for years and have interfaced either with the application or plans for the land in question on more than one occasion. The first such occasion was sometime near, or on the day of, the county-sponsored infrastructure conference on June 26, 2000, when members of the Board of Commissioners individually approached or were approached by Rich Lowry regarding the possibility and legality of sending the then-draft environmental impact statement back out for public review. As I recall, that dilemma was eventually resolved by the state Department of Ecology, who itself called for an

entire revamp of the document. That revamp produced the final EIS, which was found inadequate by the Hearings examiner in February of 1992; appealed to the Board of County Commissioners; and later upheld by the Superior Court. Now, I have run these comments past Mr. Lowry so he knows – he knew they were coming.

The second such occasion revolves around the Board of County Commissioners' involvement with the City of Vancouver proposal to sub-area plan all of Section 30, including the area under appeal. That plan first came to my personal attention I believe – and I have checked my calendar – the best I can document in late 2002. This was while the current appeal – the SEPA appeal – was still pending before the Hearings examiner. I believe that the hearings had already been held, but the decision had not been rendered. I'm not even sure if the record had closed yet. Anyway, it was late in 2002 when I learned during a Board of Commissioners' Work Session on Parks that such a sub-area plan was under discussion in designing the Long-Range Planning Department's – and again in designing the Long-Range Planning Department's 2003/2004 Work Plan, the Board of Commissioners, between the time of the Superior Court February 2003 decision, but prior to our own March 18th action remanding the matter back to the Hearings examiner, discussed and agreed to cooperating with the City of Vancouver in developing the sub-area plan for the entirety, again, of Section 30 including the site under consideration here. That decision was later codified in April of 2003, when the Board authorized a supplemental one-hundred and fifty thousand dollars of general fund spending authority to Long-Range Planning for the purpose of conducting that same sub-area plan jointly with the City of Vancouver. Fifty-five thousand of that amount was to be reimbursed by the City of Vancouver and the Evergreen School District. In other words, we knew the landfill appeal was eventually coming back to us at the time would be at the appropriation and during none of those discussions about the sub-area plan was any mention made of including a landfill. In fact between late 2002 and today, there have been several occasions when the City of Vancouver personnel and we, as members of the Board of County Commissioners ourselves, mentioned or discussed the possible purchase of the landfill site by possible private investors in order to prevent its being built. Also I and at least one other Board of County Commissioners have met individually with representatives of Rinker and Associates formerly Q-Wet, and somewhat of a participant in this discussion, about the affect of that possible sub-area plan on their continued mining rights in this section. There has been no exparte contact with either the applicant proper or the appellants on this issue. But there has certainly been plenty of peripheral talks about alternative uses for the land, for which the application has been filed. And I say this to point out only, it is very likely we have had too many discussions about the future of this site, whether it formally fits the criteria for exparte contact or not, but whether that has tainted us in this matter or not is still questionable. And if it has, it has done so equally and which, according to Mr. Lowry, means that we are still compelled to deal with this appeal today. It is quite honestly a very good example of why we should get out of the appeal business.

But besides the internal chatter, there has also been substantial public effort on the part of opponents to contact the BOC, numerous e-mails and other communications, and yesterday I did have to skip a voicemail from an opponent, but now I would also like to skip to what becomes to me much more

relevant in this discussion, a much more relevant problem. The SEPA, the Hearings examiner, the language in code that we are required to use, is all caught in mixes of time. And we have no substantive time frame identified within which to work. There is agreement among all parties apparently that this application vested in 1991, but from that point on, what that vesting means is somewhat up for grabs. And it is treated throughout the record with significant inconsistency especially as it applies to zoning regulations and to the comprehensive plan. In her letter dated January 5th, 2000, to Rich Lowry, which is exhibit 278, Leanne Bremmer, who represents the applicant, writes that the vested rights doctrine dictates that "land use applications are subject to the land use laws and regulations in effect at the time of the application." Though her intent was only to document that the currency – concurrency and critical aquifer area recharge ordinances were not applicable, her statement about subject-to-land- use laws and regulations in effect at the time of the application, is much broader than that. Lowry later agrees to the concurrency and the concurrent critical ordinance exemptions, and that is also found in the same exhibit. Though he finds that the hearing – that the application did indeed vest in 1991, the Hearings examiner in both his initial and second decision applies some 1991 land-use laws and some that came later, in particular the comprehensive plan and zoning laws that were not adopted until December of 1994 and did not become effective until January of 1995. And though the applicant vested – use vested, doctoring principles to unallowably...so avoid concurrency critical area aquifer resource ordinances, she based the remainder of her case in trying to comply with 18.410.055. (A) and (B) on the plan adopted in 1994, but not effective until 1995.

Now, the appellants originally argue in the SEPA appeal that the laws in effect in 1991 are the applicable statutes, and then they sort of allow that to dissipate into the air. So as though those two sets of land use laws and regulations were not enough, in the meantime, we ourselves are in the process of advancing our own 20-year long range vision for Section 30 as job producing land including the sub-area plan mentioned earlier of enter that – of enter that to date hopes for realization sooner than any 50 years out, and we are working hard to complete an entire new comprehensive plan by the end of this year.

So, my question is, what laws apply to this application and under what circumstances? Now, again the applicant suggests that they are the laws in effect in 1991, but the Hearings examiner never directly addresses the issue of which comprehensive plan. And this becomes relevant to me, because the controlling code on this for my part is in fact, this is long and it'll take a long time to read it on the record and is probably confusing, but the controlling issue in this whole discussion for me is, CCC 18.410.055.A.4., which requires compliance with the comprehensive plan. And we don't know which comprehensive plan. In the list of relevant codes and statutes, the Hearings examiner in February of – in his decision of 2002, he merely lists the county comprehensive plan, but he doesn't specify which one. The appeal before him was on the final EIS and he used his conclusions about that document to deny the solid waste zoning permit and the conditional use permit, and those standards in the solid waste zoning permit had not changed between 1991 and 2002. Only the elements and development regulations that were a part of the 1994 plan had been changed. So all the way through here there is a total inconsistency in the relevance of dates as far as I can tell.

Now when the appeal issue came to us, the first time on the SEPA appeal, we didn't even really deal with anything except SEPA and we passed it right straight along to the superior court because we do not hear substantive SEPA appeals, so we did not have discussions about which codes apply when we are trying to talk about compliance with the comp plan. So for
Too long we've been focused on the SEPA, and the SEPA is only one of the items that is a part of this discussion. The hearings examiner makes no clear decision or no clear finding about which comprehensive plan he's working with. He simply assumes it is the 1994 plan and he proceeds from there.

Now, if it is the 1991 plan, as referenced in Exhibit 41 and dated 1989, the comp plan designation surrounding the site in question were urban low density. But if it is the 1994 plan, the comprehensive plan designations are quite different. They are for urban holding 10 and urban holding 20. Urban holding 20 is, according to the intent of that zoning district, for industrial purposes, and it is clearly to urbanize at higher levels of density than the prior plan.

And while there is a dispute in the record over urban holding and urban reserve, it is irrelevant, because it has to do with the size of the parcels and the zoning, not whether it's urban holding or urban reserve. So I guess, Mr.Chairman, the relevant issue is to which comp plan does this vest. And I would like to hear oral argument on that issue, from all counsel, including our own.

PRIDEMORE: And I – Well, first off, I appreciate the list of the disclosures that you've made. That certainly cut my time down, because I can certainly second all of those – those comments. I've received some campaign contributions from people on both sides of this too, however not near so much I think as others (laughter.) So I don't feel it – it plays any role. Your points regarding which plan and your focus on the issues at stake here in the appeal I think are very appropriate and interesting. The interesting part, however, to me is that nobody appealed on that issue, which seems so salient. Lacking in appeal, we've been frequently cautioned about bringing in issues during appeal reading that weren't appealed items. So, for me I would be inclined to say we should rule on the appeals that are before us, rather than taking on additional issues.

STANTON: And it was difficult, reading the record, I had exactly the same kinds of comments you did. In fact originally my notes had in it, what comp plan are we using, here, and what zoning? And so I understand your concerns, because when you go back and read the whole record, those issues do come up, but the point of the matter is that it wasn't appealed, and it's not one of the issues in front of us right now.

In terms of A-4, and the capital – comp capital plan that's mentioned in there, my assumption was that since it was this 1994 solid waste management plan, with these considerations, and these four criteria that we need to find are in place, that we were talking about the 19 – it was adopted with the 1994

comprehensive land use plan, and so my assumption was that was the comp plan that we were referring to here.

MORRIS: Actually it was not adopted with this comp plan; it was adopted in May of 1994. The comp plan itself was not adopted until 19 – until December. It did not become effective until January of 1995. So at that point in time, when that solid waste management plan was adopted, the existing zoning was indeed the old zoning that had been in effect in 1991.
STANTON: Well it may have been, but in my reading it was adopted as a part of the '94 plan. So it may have been adopted earlier in the year, but then was readopted as a part of the comp plan. That was the way I read it.

MORRIS: No, it is not. If you go back and look at the comprehensive plan, it is not adopted. It is referenced in conjunction with the policy on solid waste, and that policy primarily says that they want to try to pay attention to the solid waste management plan, particularly for the purpose of cutting down on the waste stream and encouraging recycling. The plan was amended and the plan was amended to include this particular potential landfill, but that predated it, and it was not readopted. What that adoption does say to me is that at least in the minds of the county commissioners who were adopting all of that at the time that at least in their mind, the land use part of the discussion was compatible if it passed all other tests, but it was not adopted – readopted as part of the comprehensive plan.

PRIDEMORE: I can't read into the record what the – was in the minds of the commissioners at that time; however we do have a very clear statement in Exhibit 796 by Brian Carlson, who was responsible for development of the plan at that time, the way they – his explanation of it is fairly clear that while the comp – solid waste management plan referenced that this project was lingering out there, it was not included as a site specific use in section 30. It was used to demonstrate that there was a private sector interest in providing that service somewhere within the county.

MORRIS: Right, I agree.

PRIDEMORE: So, you don't want to read too far into it.

MORRIS: No, I don't, but in either that same exhibit or another one, Mr. Carlson also suggested it was included there specifically to provide notice that the discussion was happening. So I think there was some contention about whether or not its listing in the Solid Waste Management Plan gave it some sort of special standing, and I would – never thought it did. But –

PRIDEMORE: We have the issue before us of the – whether we wish to take additional testimony regarding which plan was appropriate.

MORRIS: Oral, right.

PRIDEMORE: Is there –

MORRIS: And I – okay.

PRIDEMORE: Is there additional –

LOWRY: It would not be additional testimony. It would be oral argument.
MORRIS: It would be oral argument – legal argument – on the legal issue. And I guess I would just point out, again, since there was no finding, what was there to appeal?

PRIDEMORE: Well, there was the fact that his entire reference throughout the final order was to urban reserve zoning, which as you point out was not there prior to the adoption of the comprehensive plan. So that certainly wasn't appeasable.

MORRIS: I'm sorry, but what wasn't there?

PRIDEMORE: The zoning – the urban reserve zoning was not in place prior to adoption of the plan. The Hearings examiner uses that throughout his argument and his reasoning; that was certainly something that could have been appealed, but wasn't. Is there –

MORRIS: I guess that didn't – right, but there's no clear finding. He makes – well, we're getting into other kinds of things, here, but he also makes a finding I believe, or seems to assume that urban holding 20 was for the same purposes as urban holding 10, which it isn't.

PRIDEMORE: They use the reference to urban holding, but throughout his final order he refers to UR zoning and the standards and criteria that are applicable to it. You know the staff recommendation, it was correct. The UH – the reference that he makes to UH – was – wasn't salient, it was virtually a typo; clearly didn't affect how he went about making his findings. Is there additional – I'm sorry.
MORRIS: I guess – okay. I guess my point is, it is a – is a matter of law, and we have the latitude of having that discussion –

PRIDEMORE: – Is there additional --?

MORRIS: – whether it was specifically appealed or not.

STANTON: If it were an item that was on appeal, I'd be interested in this.

LOWRY: This particular issue is one that I think you can go either way on, although it's – it has not been appealed, it's so fundamentally intertwined with issues that were appealed that I think you could decide to take it up or I think you could decide that because nobody's raised it, you're not going to look at it.

MORRIS: I raised it. (laughs)

PRIDEMORE: So I guess I'm asking, are there two votes requesting additional oral argument?

STANTON: No, we had had oral argument – argument requested by the school district, and I was going to suggest that unless we really got bogged down on an issue that is under appeal that we not do that. Wait and see. But I can't support oral argument on which comp plan was in play.

MORRIS: Okay, then can we each clarify which one we at least believe we're using?

STANTON: I tried to.

PRIDEMORE: I base mine on what the hearings examiner based his on, which was the UR zoning, which was the 1995 comprehensive plan.

STANTON: Now you've thrown another year in there. 1994 – It was adopted in December of 1994. That's right.

PRIDEMORE: 1994-95. It took effect in 1995.

STANTON: I worked with the understanding that the comp plan that was referred to was the 1994 version.

MORRIS: And I originally worked with that understanding, too, but the more I – the more I read in the record and the more I delved into it, the more I thought that was incorrect. That it should be 1991. So if the majority of the Board is working from 1994, I will work from 1994 and that plan. I'll just throw out for the record, in case anybody changes – wants to change their mind, that it appears to me that if we use the 1991 plan, which is totally not allowed, only if you use the 1994 plan do you have a shot at it. And at that point in time, the discussion becomes more complex for me.

PRIDEMORE: I think we might – I mean I certainly didn't research it from the 1991 viewpoint, as I look at this, it's allow ability in either case is equally the same but the challenges that were faced in the 1994 plan are the same as if not greater than the challenges that were faced in the 1991.

MORRIS: Well, they're not. Excuse me for just disputing that so vehemently, but the surrounding zoning in the comprehensive plan in 1991 was urban low density. That is not the same as urban reserve.

PRIDEMORE: Okay.

MORRIS: Now, anyone want to change their mind?

PRIDEMORE: I guess I'm hesitant because I didn't look at it from the perspective of that plan. And I don't know what the surrounding zoning was or those issues or even what – which code provisions were applicable then verses were applicable. I mean I'm basing this on what the hearings examiner made his rulings on.

STANTON: Not only did I not study it from the viewpoint of other than the '94 comp plan, neither did the hearings examiner.

PRIDEMORE: That being the case, is there – wish to begin argument?

STANTON: I guess I would just suggest – I'm sorry.

MORRIS: Did you want us to proceed in a way –

STANTON: I was just going to suggest that as a matter of how to proceed, that we follow the same kind of an approach that the hearings examiner did, where we use the considerations, the list of considerations and try to figure out whether – have some discussion as to whether we agree with his determinations, since that leads into the four main criteria that we need to find for-

LOWRY: Before you get into discussion, would you like to have a brief, very brief overview in terms of what standards of review you're working with?

STANTON: Sure.

MORRIS: Yeah.

LOWRY: Well, this is redundant for you, but may be helpful for the audience. You are sitting in a special capacity as the Chair indicated at the outset. You are limited to the record made by the hearings examiner, and you cannot, under state law, take any new evidence. Second, your function is a judicial one. You're reviewing the examiner's decision against the record to – for error. You are not re-deciding the case, but instead are reviewing for error the decision of the examiner. There are a number of standards of review that apply to your review of the examiner decisions. There's three that are applicable under the appeals that are before you. Some of the
appeal issues relate to whether or not the examiner's findings are in error. That question – you are mostly constrained in what you can do with that question. If there is substantial evidence in the record that supports the – and examiner finding of fact, you're bound by that finding, even if you would have come up with a different finding from the evidence. You're least constrained on issues that deal with whether the examiner appropriately construed applicable law, county code provisions. You can substitute your judgment for the examiner on those sorts of issues. Most of the claims of error that are in the appeals, however, fall within a standard of review that is somewhere in between. Most of the claims

of appeal deal with whether the examiner misapplied, may have properly construed the – the county code provisions, but misapplied it to the facts that he found. The standard of review that's applicable there is even though there's evidence in the record to support the application of law to fact, you're left with a definite and firm conviction that a mistake has been made; that you can't freely substitute your judgment as you can with improper construction, but you're not bound to the application if there is substantial record – or evidence in the record. Instead the test is whether you have a definite, firm conviction that a mistake has been made.

PRIDEMORE: Questions or comments regarding that? Would someone like to begin argument?

MORRIS: Mr. Lowry has suggested we work our way through the sort of chart grid that the hearings examiner included on pages 22 through 24.

LOWRY: Remembering that he failed to include A-4 in the chart.

MORRIS: We do discuss it. Yeah.

LOWRY: And I would recommend that you start with considerations under B, because those are intended to assist you in determining whether the required findings in A can be made.

PRIDEMORE: Okay. Does that sound reasonable to everybody?

STANTON: Yes.

PRIDEMORE: Let's begin – do you want to just go through each of the criteria in B? Paragraph B? So, B-1. Argument? This is the criteria –

STANTON: Keeping in mind – yeah right, that these are not really, I guess, criteria. They're more – they're considerations. And I think when the advisory committee that originally put these together, if I'm remembering correctly, put the considerations in place, they said that we shall consider – and that's what the code says – we shall consider these topics. It doesn't say anything in there about the fact that we should make one more important than another, but it – you can't help but going through in considerations and giving various weights in your own mind as you are considering these topics. The first one in – this is in the B category, since I know a lot of you followed the A and B, and going down that list of 12 or 13 – 13 doesn't really apply here – but number one reads, "the character of the existing and probable development of uses in the district and the peculiar suitability of such district for the location of any such conditional uses. The hearings examiner says that this is mixed, that it does and does not comply. He found the character of the area is mixed." All the way through the record there is discussion about definitions, and getting really specific at looking at words. In this case my question was what is a district? You would presume it is a zoning district, but it's not really defined in here. The hearings examiner based his findings on what is today, rather than what is probable. In my mind I do interpret this

differently than the hearings examiner did, due to what is documented many times in the record, and acknowledged that the area is transitioning, and so I put more weight on the probable development. And agree that the existing uses are mixed, and agree that someone at the – one of the – at the hearing that I was watching on videotape called the gravel mines a dinosaur, and I have to agree that they're becoming extinct in urban areas. This area is inside an urban growth boundary. And actually except for the mining operation it would have been annexed into the City of Vancouver in 1997. It's clearly intended to be urban, and is rapidly transitioning that way. So, therefore, I would put more weight on probable development since were talking about a use that would occur in the next 50 years.

MORRIS: And I would agree with you about the probable development, but I might come to a different conclusion than you do. The zoning here is urban holding 20. The purpose of urban holding 20 is for industrial development; that is the intent of urban holding 20 in code. If you read the entire code of the zoning district it is for industrial. So –

STANTON: And we do get into discussions frequently about what is industrial. It can include everything from a very light, not very intensive use, business parks that are beautifully landscaped, to heavy industrial that you would consider the current operation to be. And I agree that it is urban holding. Urban holding is intended to be turned into urban use within the 20-year plan. And, so, it's clearly intended to be urban, and the industrial designation is yet to be defined,
would be defined when the – when the real zoning was actually applied.

MORRIS: I don't disagree with you at all on anything you said, I would just suggest that, to me what that means is that the landfill is not inconsistent with those, and I think that the hearings examiner has said that it is both inconsistent and consistent and I would clearly stick with that. We don't have – we only have one indication of what this site might look like. And that's in the record that I could find and that's a schematic that was a part of one of the technical documents and its got a copy of a Prospectus newsletter in it, and its got a possible design for section 30, and it's clearly delineated in the very same area as this. And it – it demarcates it as industrial and some parks and open space and some other things like that. So I think – I think that – I certainly couldn't get the point where this is inconsistent with existing uses. And it – I do think it is, in this particular instance as opposed to…again, I'm going to go back to my little Sub 4, A-4…I think this one is specific to the zoning district. Just – mining.

PRIDEMORE: Yeah. And the hearings examiner concluded that this was consistent, and okay with the mining aspect, the mining overlay; however, that it was not consistent with the UH zone. Your argument is that it is consistent with the UH zone?

MORRIS: Well, I think he says it's urban holding 10, and that's an error. In fact, it's urban holding 20. And there is a difference in the intent of the uses of those. And again, that's only in the 1994 plan.

PRIDEMORE: And it – even when something – whether it's UH 20 or UR 10, at the time that it's brought into the comp – to the urban growth boundary, the anticipation is that you would zone it for the appropriate use at that time, it's really –

MORRIS: Right.

PRIDEMORE: the significant difference. There's some usage difference, but the significant difference is whether you're protecting 10-acre parcels or 20-acre parcels, it's not to say that just because it's UH 20, the only thing that can ever go there is industrial. In fact, that would probably be a pretty large leap to make, considering how we do zoning these days.

MORRIS: These days, yes, but it was those days we're talking about, and I guess there is clearly a distinction in the purpose in the code language between urban holding 10 and urban holding 20. The purpose of those two is different. That's the only thing that I'm trying to get across here in terms of intent. I don't think that this is a make or break issue, if there are two votes to say that this is not consistent with existing and probable uses, there are two votes. I'm happy to uphold the hearings examiner the way he is.

STANTON: The only other indication as to what it could become is the covenant release that we're asked to act upon as part of this, which specifically calls out under the current covenant that the land would become residential. So that's another, albeit small, indication.

MORRIS: I didn't remember that. I thought it just said it was going to be – I have to go back and read it…the covenant.

PRIDEMORE: So I'm hearing, under B-1, we are agreeing with the hearings examiner that it's consistent with the surface mining, but not consistent with UH zone in probable future uses.

STANTON: He marked it as both "does comply", "does not comply". In my mind I don't think it passes the test, in my mind, of positive consideration. So I would have to put it – If I were using the same categories he is, I'd say it doesn't comply.

PRIDEMORE: His distinction in it is that the surface mining portion is compatible, but that the probable future uses are not compatible. So, that's where he said it is and is not.

STANTON: Right, but I put more weight on the probable development, since there is so much discussion about how this is a rapidly transitioning area.

PRIDEMORE: I agree. B-2…

MORRIS: Before we go over that, are you the upholding hearings examiner or changing him? I'm upholding him. I believe that Commissioner Stanton is suggesting that we disagree with him and we mark that only as inconsistent.

PRIDEMORE: Is that what you're saying?

STANTON: Uh-hmm.

PRIDEMORE: Well, I can't agree. I would uphold the Hearings examiner's ruling that it is consistent with the surface mining, but it's not consistent with the urban holding.

STANTON: Yeah, I mean, I think that's a true statement. It all comes down to how you weight it. And I think because these are only considerations, that we have the ability and should be weighting these in our own mind –

LOWRY: Remember, these are simply considerations. These aren't pass, fail. And they become important when you get to the four required findings.
COMMISSIONER: Right. B-2, property –

MORRIS: I want to make one other comment. The commissioner says these things are matters of law; In fact, they are not either. They are matters of discernment and judgment, and they are discernment and judgments that very reasonable and rational people, which we like to think we are from time to time, can and do disagree on. So, I guess I don't even think he's right to say that.

LOWRY: That's exactly right. And that's why it's subject to the clearly erroneous test: do you come to a definite and firm conviction?

STANTON: Right. In fact, it even says in the heading on B – "in making such findings, the approval authority shall consider, among other things…" So, I mean, you can even go beyond this.

PRIDEMORE: But to stick with what we said we were going to do, here. B-2, property values and the most appropriate use of land. The hearings examiner found that this proposal was not consistent with that objective or that criteria. Argument?

LOWRY: This is one, also, where there is a – one of the appeals has a challenge to an examiner finding of fact. The examiner reduced his estimate on the extent to which the property values would be affected to 3 to 6 percent, that reduction being based upon the superior court determination that significant impacts could be mitigated. And the challenge is that there isn't substantial evidence in the record to support that finding of the examiner.

PRIDEMORE: There was substantial evidence in the record to support a whole range of decisions.

MORRIS: And I think that's one of the troubling parts of this is that the hearings examiner initially dealt with the SEPA appeal, and made all decisions relative to all the rest of the criteria based on his decision on the SEPA appeal. So when he went back and had to redo it he had to redo all of his findings again, only in terms of the SEPA appeal, and that's all he's left us. And there are clearly those words. What is it…"other"?

STANTON: "Among other things."

MORRIS: "Among other things." Right.

PRIDEMORE: You're exactly right. As I read it, the hearings examiner merely took the SEPA as being the entire issue that he was deciding on, and that had already been decided in court. So these areas of weight and balance and judgment and things seem to be treated in the black and white SEPA-like conclusion. Is there argument against his conclusion that this would not be consistent with the property values and appropriate use of land?

STANTON: No, I agree with his reasoning, specifically that the proposed use doesn't provide new benefits.

LOWRY: Other than the challenge to the finding of 3 to 6 percent finding, the other appeals on this are essentially that the examiner didn't give it enough weight, again, in error in – there is no appeal saying the examiner erred by finding it – that this criteria was not met.

PRIDEMORE: Yes. I guess I was just trying to walk through the thing and take it in the bulk, because when we get to A4, A-1 things that will –

STANTON: You can – you're right. You can find different numbers throughout the record. And I guess I would have gotten to the same kinds of numbers that the hearings examiner got to, but it would be more related to that one study that is in the record that I think I made a note of – in the 1992 Journal of Real Estate Research, where it gives some numbers, but it's for a different kind of landfill. So, you have to make some kind of an accommodation there. So, I can't find any evidence in the record to dispute what he said without weighing the same kinds of considerations that he had to.

MORRIS: And I guess the key for me is use of the word "encourages" – whether this encourages it or does not encourage.

PRIDEMORE: B-3?

STANTON: Well, I think, Commissioner Morris, that that's a good thing to point out. I think that –

MORRIS: Well, I think in one area we talk about, does it prevent? No, it doesn't prevent. Does it encourage? No, it doesn't encourage.

STANTON: And it really does. It comes down to those individual words, when you start to take something apart. There's a lot of argument that way. And in fact the hearings examiner does argue that it would discourage, rather than encourage the use development and enjoinment of nearby land to the west, southwest, southeast and east. So, he does talk about that. And I do think that it would not encourage.

PRIDEMORE: B-3 – Traffic. Standard is whether it would create an undue increase of vehicular traffic congestion.

STANTON: This is kind of a funny one. I couldn't even give this one a whole lot of weight, just because that is an issue that we deal with all over the county. It's not unique to this proposal.

PRIDEMORE: Actually on this one, while the standard here is a little bit different, this is one of those things where I did consider one of those, among other things, which is not so much the traffic congestion as the character of the traffic; that the trucks and things going by this area would have some impact on the probable future development. So that was something –

LOWRY: There was no appeal on either 3 or 4.

PRIDEMORE: Again, I think it was just taking it as a bulk issue, and hopefully leading into the discussion about A. Criterion A.

MORRIS: So, what are you doing? Are you leading us? Are you upholding?

PRIDEMORE: Oh, I'm just discussing, I'm just walking all the way through each of the standards. We can certainly skip the ones that weren't specifically appealed.

STANTON: Specifically on 3, though, would you disagree with the hearings examiner's determination?

PRIDEMORE: To me it's not black and white. It's the overall character impact of this type of development on the probable future uses of the area. And so, no, in terms of the standard - the specific standard addressed, which is the traffic congestion issue, I don't disagree with him that it's somewhat relevant, because it doesn't trigger anywhere near the level of service standards, which is our yardstick. So I don't disagree with the statements. There – it just seems to me that in

weighing the impacts of this, the character of the traffic is significant as well.

B-4 – Sewage, refuse (inaudible)…whether that is an adequate, not contested issue….

STANTON: No indication it isn't, and I'd have to agree with the hearings examiner that this consideration is met.

PRIDEMORE: B-5 – Obnoxious gas, odor, dust?

STANTON: This is one place I had to disagree with the examiner's interpretation of this consideration. And, again, this is just reading the words that are written in No. 5. To me it's a yes or a no answer, "whether the use or materials incidental thereto or produced thereby may give off obnoxious gases, odors, smoke or soot. Hearings Examiner determined that it did comply." When I look at the wording, or as the attorneys often say - "the plain meaning of the words," it simply says it will consider whether this use may give off obnoxious gases, et cetera, not whether you can mitigate for the impacts. And the reason that that was important to me is when I got down to No. 11 on this list, it does talk about mitigation in terms of hazards. But here it doesn't talk about mitigation. And these considerations – and at this point in the approval of a citing, and it's pointed out a lot about the EIS doesn't have really specific information, because there's still other tests that need to be passed, through site plan review and through the operations permit, et cetera. It's important to remember that this is from the big global look at this site, and it doesn't talk about whether or not you can mitigate for it. It just says whether this use – whether the use for the materials incidental thereto or produced thereby may give off obnoxious gases, odors, smoke or soot. I think there's evidence in here that it may.

LOWRY: I think it's important to realize, again, that this is simply consideration, and the extent the examiner felt what was bound by the superior court determination that these impacts could be adequately mitigated, so the weight you give to this factor needs to be impacted by –

PRIDEMORE: I think that's the point. The superior court said that this could be mitigated under SEPA. That doesn't deal with the issues of whether or not the – whatever level it is has an adverse impact on the surrounding area and the future development of the area. That's – and as you say, that is a consideration to put on this balancing thing to determine whether or not it meets the criteria. So I don't – this is the place where I think the hearings examiner relied on the SEPA standard rather than considering what impact would this have on the surrounding areas and ability to develop. So, any comment? Commissioner Morris, anything?

MORRIS: Oh, this is an area where I think the SEPA specifically addresses the issue, and the court's spoken to it and obnoxious is obnoxious, depending on who's having the experience. So I don't see a reason to do anything – come to any other finding than the hearings examiner did on this.

PRIDEMORE: B-6 – Noise?

MORRIS: What did we do with that?

PRIDEMORE: Well, I think – there's different respects here, again. This isn't whether we're not approving –

MORRIS: The finding was appealed. And I think what happened here is that the end you get to the bottom and if you've moved too many dots one direction or another, you may find yourself with a different result. This is a moving dot.

LOWRY: I think again this is all headed back towards A. And I think what's important is when you get to A, if you all agree on how to answer the A questions, that's what's important. And I think it's important that you then go back – you can have different ways you got there by giving different weight to different considerations.

PRIDEMORE: Again, just going through the Bs, thinking that as we go through and have this discussion, it would be clear where we weighted and came to our conclusions under the A criterion.

STANTON: All I'm saying is that I'm looking at each individual word. And you know how many times when we've been writing code we have disagreed on whether it will be "shall", "will", "may." And in this case this talks about "may give off." So that's pretty clear. In 6 – when you get to 6, it talks about whether the use will cause disturbing emission. Now, that's a little bit higher standard in my mind. It's not just a question of "may," it's a question of you have to show that it will. And on that one, I have to agree with the hearings examiner. I can't get to the "will." And it's the little words that to me say what it is that those who adopted this piece of code were trying to get to.

PRIDEMORE: That's a good point. I looked at this, again as an issue of – I didn't look at the individual words, but more the – is this going to have an impact on the area's ability to develop at the urban level that it is intended to develop at. If it's going to hinder that for a 50, 58, 47, whatever-year period, then it comes to an adverse impact on the comprehensive plan.

MORRIS: But that isn't a part of this one.

PRIDEMORE: No, it's not. It's not. I'm just trying to put it in context.

STANTON: I mean that's what we're trying to get to, you're right. But on this part of it I think the writers of these considerations had something in mind that they wanted those who came after them to consider. And so the little words make a difference. What is it that they wanted us to take a look at when we were determining whether this was an appropriate site for this kind of a use. And the fact that they used "may" in one sentence or one consideration and "will" in another one, to me, is a clear difference. And in one where they talked about considering the ability to mitigate for an impact of safety

hazards, and in the others where they didn't talk at all about mitigation, but just in general. Is this use of this land going to cause this? Yes or no. It's pretty simple.

PRIDEMORE: I'm beginning to come to the conclusion we should have left B alone and gone straight to A.

MORRIS: I think you're right. (laughter)

STANTON: But this is the part that I think helps all of us to get to, considering 1 through 4 in A, this kind of a discussion, because we've all read this separately, we've not talked about it. And here we are our first time to talk about it and I've read it differently than you have. And that's okay. I'm trying to explain the way I read it. And so when you get to No. 6, it has a test that says it will cause these results. I can't get there. I mean I think there's anecdotal evidence in the record, especially from the people who live near the east Portland site that's similar to this, but I honestly can't find fault with the reasoning that the hearings examiner used to get to the determination that the proposal does comply with this particular consideration.

PRIDEMORE: And for me it's not a yes, no, black, white issue. It's a – amalgamation of a lot of different impacts that eventually come to a conclusion regarding criterion A.

STANTON: Yeah. I understand.

MORRIS: Hearings examiner has a definite advantage over us. He only has one mind he has to work with. He gets to do it all by himself. He doesn't have to do it in public. All he has to do is do it and then write it down.

PRIDEMORE: We don't have that. So B-7 – Interference with public parking or recreational facilities?

MORRIS: I probably still need to – if you don't mind.

PRIDEMORE: I'm sorry. No, please.

MORRIS: We slopped around here between 5 and 6. Just for the record, so we'll know that the hearings examiner in this chart has used the word "will." That is an incorrect use of the law. Again, the code says "may." And I probably could say yeah, they may be, but are they obnoxious? That depends again on the mitigation and the SEPA, so I don't agree with Commissioner Stanton on 5. I do agree with Commissioner Stanton on 6 because indeed the language in the code does say "will," and so does the hearings examiner.

PRIDEMORE: Okay. 7 – Parking or public facilities…recreational facilities?

STANTON: I agree with the reasoning that the hearings examiner used, this is the one where he tried to find evidence that proposed activities would keep a reasonably sensitive person from enjoying the recreational facilities. And I have to agree that that's a good test, and agree with his – that it does meet that consideration.

MORRIS: Me too.

PRIDEMORE: And I largely agreed. To me, in and of itself this was not a big deal, but it's just one more thing that does stray a little bit in the gray. There going to be some impacts. So it's still an issue in my mind. B8 – Large enough to accommodate suitably surfaced parking?

STANTON: I think that's clear; it can accommodate the parking.

MORRIS: It's big enough for parking.

PRIDEMORE: I think we could do Chair parking there.

STANTON: We could use some of that parking here.

PRIDEMORE: 9 – Site sufficient, appropriate and adequate?

STANTON: That one was interesting because this is the one where he said it does, doesn't comply. And you need to take everything into consideration to determine whether or not this site, this plot, is appropriate and adequate. I have to agree. That's what it's all about.

MORRIS: Well, I guess I have a little mixed feelings on this one. I can stick with the hearings examiner's decision on it, but I guess I would comment that in the solid waste management plan the discussion about adequacy leads to large, and the suggestion there is that you are better off with a large area than you are with a small one because you don't have to have so many and they last for a longer time. So I guess I would – I mean if there's a second vote – if there were a second opinion to that measure, I would say that it does comply with sufficient, appropriate and adequate. The hearings examiner talks about whether or not there's a local supply of landfill, sort of like is this close to where the debris is going to be created. And it probably isn't, because according to the hearings examiner it's going to be residential, and so you're not going to have that much waste from residential, but it isn't compatible with residential. So, I found he was very confusing in that area, but I would be willing to leave it like it is. But if it is going to change, I certainly would change it in favor of yes. It is sufficient, appropriate and adequate.

PRIDEMORE: I looked at this as almost irrelevant in a lot of ways. It just seems if it was not adequate, the private sector would not be interested in utilizing that site. But it does get into solid waste management plan and all those issues and so it is a little bit more complicated distinction, but it seems an

odd one to have in code for conditional use. But it being there, I have no problem with the hearings examiner's conclusions or arguments.

B-10 – Whether it's unreasonably near a church, school, theater, recreational area or other place of public assembly.

LOWRY: Again, the only appeal on this one is that the examiner, it's alleged, failed to give adequate weight to this criteria.

MORRIS: That's on B-11? Or B-10?

LOWRY: The appeal does not disagree with the examiner's conclusions here, but rather says that insufficient weight was given to that under A.

PRIDEMORE: And again, we're just building argument for what goes on with A.

MORRIS: I'm going to disagree with the hearings examiner, since we're disagreeing whether we are under appeal or we're not, despite our decision only to deal with appeal issues. I don't think it is unreasonably near to a church, a school or a park. And I don't know that the mitigation is so relevant to me in the discussion as it is the distance in the intervening zones. And the school is on public facilities zoning to the – so let me talk about the school a little bit, first – to the south and the east. But there is an intervening zone, which is urban low, and that intervening zone contributes a great deal to what "distance" means. There's the intervening zone and apparently, from the map I have in front of me, which was from the record, an intervening parcel. Additionally, there's 192nd, which has historically, publicly – I don't know how it could have not been known to everybody in the universe – been specifically developed and was mentioned in the comprehensive plan of 1994 to be developed for the purpose of serving industrial developments along this road. So the school, when they purchased the property and asked for the zoning change in 1993, which was, by the way, a zone change from the old plan, so that it was called a school site, it was – knew, or there would have been a reason for them to know, that at least there was mining there. There were industrial uses and obviously a concrete plant. And so the school sort of opted to be there, the church sort of opted to be there. There are significant distances. The only hard and fast criteria that we've got – I can't remember where it came from, somebody help me – what is the thousand feet from the school issue?

STANTON: You're getting to I think what I used as my definition of reasonably near, which was the same one the hearings examiner used, which was—yeah the school, the church – schools, church and the commercial area, the eating establishment are within a thousand feet right now. The criteria that I think you might be referring to is Appendix F in the Solid Waste Plan that talks about most affected, or most impacted – I can't remember exactly the term –

MORRIS: Those are the most suitable and the non-suitable zones, adjacent zones.

STANTON: Yeah. Right. Right. Within 1,320 feet was the number that they pulled out. Is that what you're after?

MORRIS: Right. That's probably the one I'm thinking about. So, anyway, and then there's also the standard in the WAC, which is 250 feet buffer from residential zone, which isn't a school, but they're allowed. But in any event I just –I didn't think, given the sequence of events and sequence of applications and the discussions about 192nd and the future industrial development of this area, that we would – that it was unreasonably close.

STANTON: And I used the same test the hearings examiner did, going back to appendix F of the '94 Solid Waste Management Plan. They used the test of residential, schools, churches, eating and drinking establishments within 1,320 feet of the landfill site boundary. And these obviously are, and so I have to agree with the hearings examiner on how he got there and where he got. The one thing that I would add to that in terms of my take on it is I would give it quite a bit of consideration, mostly because of the last words in this where they talk about, "or other place of public assembly," which to me may be getting to the importance of giving greater consideration to nearby uses, where you have a higher density of people on a site, as something that the – that should be considered.

PRIDEMORE: And I use the exact same criteria as you and the hearings examiner did on this. I came to the same conclusion. The – thinking in terms of where the schools chose to site, I think we still have a tendency in this community to think of industrial development of being big steel mills or something like that, and not just in this issue, but the Comprehensive Plan and everything else, the kinds of things that we see developed on industrial lands in the modern era are not as unpleasant as they historically were. And so the schools choosing to locate here probably still have every reason to expect that that area will develop in a way that's compatible with the location – with the schools.

MORRIS: And I just would – I guess I just, for sake of argument, would say that in 1993 when that plan was done, and in 1994 when this plan, which we're using as our basis was done, it was zoned mining, and the intent wasn't for it to be continued to be used as heavy industrial mining. So while we certainly are changing, and that is a product of our discussions, again, on the brand newest and not as yet adopted, but a glimmer in our eyes, 19 – or 2003 plan, at the time of this one, and the time of the change I think that that particular site, the kinds of uses that were there at the time were the kinds that were expected in some ways or could have been expected to continue.

STANTON: But the fact that there is urban holding would indicate that within the lifetime of that 20-year plan that we're now 9 years into, it would become urbanized.

MORRIS: Oh, absolutely. Absolutely. Urbanized as industrial.

STANTON: Which we haven't yet defined, because the exact zoning hasn't occurred.

MORRIS: Well actually industrial zoning at that time did have allowed uses. And that's the zoning that we are using at this particular point in time, from the 1994 plan. The issue of using office park and some other kinds of zoning discussions are a product of our work on the future plan. But in this time frame, this 1994 plan, there were clearly allowed uses under industrial that included mining, gravel crushing, asphalt batching and mixing, and concrete stuff, and concrete trucks and a whole bunch of other things like that. So this, again, for the sake of argument, this whole business of which comp plan we were using is pretty relevant when we
start talking about what the school could have expected at the time they decided to site there. And we weren't talking about pretty office parks. There was no Columbia Tech Center in 1993, so –

STANTON: But we have made changes to the industrial code, and made quite a few allowances for additional services, and commercial, et cetera, to be used there, that is clearly not all just heavy industrial.

MORRIS: But we hadn't in that time – at that time we made those – we weren't even here in '93. Okay.

STANTON: Okay. I'm just pointing out it's not just a glimmer, that it's something we might adopt at the end of this year; that we've been working towards it.

PRIDEMORE: Let's move on to B-11 – Hazard to life, limb, property. Hearings examiner considered the risk for pedestrians on First Street.

STANTON: I agree with the hearings examiner in his discussion, and the determination that this consideration is relevant and significant and it's not been met.

MORRIS: I agree with the hearings examiner, too.

PRIDEMORE: I do too. B-12.

STANTON: This one seems like it just deals with the conditions that have been attached to this, if it is approved. And so I guess we just have to assume that they are all doable.

PRIDEMORE: So let's move on to A-1. A-1, specific criteria, that the use will not prevent the orderly and reasonable use in development of surrounding properties or properties in adjacent zones.

MORRIS: I agree with the hearings examiner. It will not prevent it.

PRIDEMORE: Commissioner Stanton?

STANTON: Yeah, in this case, not prevent is – since I'm picking at words, and this is an important consideration here, "will not prevent," that's a pretty high standard. I agree that it probably won't prevent development from occurring nearby, but it could, for example, prevent the school district from deciding that they may put a second elementary school there, if they feel like doing so, might put kids in harm's way, should this use be approved. I do think it's a pretty high standard to prove, but I don't find evidence in the record that the proposed use will prevent orderly and reasonable use of development in the area.

PRIDEMORE: Same here. And – It is an issue of the standard. I think it would hinder the development in the orderly and reasonable use, but it would not prevent. So, I would agree with the hearings examiner's conclusion. A-2 – Public, private –

LOWRY: You don't have appeal on either A-2 or A-3.

PRIDEMORE: I suppose we can just go ahead and skip the portion to discuss—

STANTON: We'll just acknowledge that they do meet the criteria.

PRIDEMORE: Yeah. A-4 – Proposed use and any expansion does not impair or impede the realization of the objective of the comprehensive plan, and it would not be detrimental to the public interest to grant such proposed use.

MORRIS: You go first. We've both gone first. (laughter)

PRIDEMORE: Okay. I just – as Chair it always seems like you should defer and let things go on.

STANTON: That's nice of you. (laughter)

MORRIS: Unless you want to be first, and then you can always invoke the privilege of the Chair. (laughter)

PRIDEMORE: Well, this is one that – this is where the rubber meets the road. And clearly to me I think in looking at the 1994 plan, and the intentions surrounding urban level of development as anticipated in that area, I've come to the conclusion that this proposal will impair and impede realization of the comprehensive plan. Specifically I think it is very reasonable to expect and assume there will be additional residential, presumably mid- and higher density residential than we're currently seeing in the area, that will have associated commercial developments, and the industrial or business park, all those kinds of zones. The anticipation of that land under the urban reserve zoning has attached to it an expectation that we will be able to locate additional residences in that area, and that we'll be able to generate a certain number of jobs out of that area. And my conclusion is that this development would

hinder the use of that land for that purpose, and therefore it would hinder realization of the comprehensive plan, and therefore is not in the public's best interests.

STANTON: And I agree with your arguments and your line of reasoning. It was interesting to me that in the hearings examiner's determination he actually made the same kind of an argument in his discussion under A on page 18 of his final decision, explaining how the use and development of the surrounding land would be impaired. And those are the key words. It's just finding, meeting the test of impairment or impeding development of the surrounding land. You look like you're ready to –

LOWRY: I just want to, just for purposes of the record, make sure that in this discussion, you at some point get in the magic words "definite and firm conviction." You can't just substitute your conclusion as to how the code standard should apply given the facts in the record. If you're going to overturn the examiner, you have to do so because you have a definite and firm conviction that he was wrong.

PRIDEMORE: I have a definite and firm conviction that this development would impede realization of the comprehensive plan. And that he was wrong.

STANTON: And I also am firmly convinced that he made a mistake. And I can't find that the proposed use meets the test of 18.410.055 (A). And I feel that we should overturn the hearings examiner, deny the application for a solid waste zoning permit.

MORRIS: Well, this is the one that I struggled with the hardest, and it would have been abundantly easier if we just said we were going to use the 1991 plan. But we didn't. We said we were going to use the 1994 plan, and so all the way through the discussion I tried to focus on the 1994 plan and what were, at the time of this application under the 1994 plan and the discussions here of relevant codes, and that has made it very, very confusing. And I wish – I'll be blunt – I wish that I could disagree with the hearings examiner on this, because I believe that in all other regards this application meets every single test that it is required to meet and I believe that the court decision under SEPA was substantial. But the compelling issue for me is that it is 50 years out. And nothing in the comprehensive plan is intended to take 50 years to fulfill. We do 20-year comprehensive plans. I don't think the urban reserve with an urban holding zoning is nearly so relevant here, or what the expectations are for fulfillment of the comprehensive plan, so much as it is that anything that takes 50 years to do, is not going to contribute to the fulfillment of the comprehensive plan. I think that in many regards the landfill will indeed fill the hole, it will indeed bring it to a workable level, that it will indeed give opportunities for development that are not existing now, but it won't do that for 50 years. This is a point where the adequacy and the size of the landfill seems to be relevant to me, although it meets the standard in the Solid Waste Management Plan. Were we talking about a landfill completion where you might be able to finish part of it and then redevelop it? That would be one thing. But we are talking a 50-year completion cycle. And when it gets right down to it, I guess, Mr. Lowry, that all of those considerations – maybe this is clearly erroneous, I don't know – but all of those considerations didn't bear on the 50-year horizon. And again on the parts and the language that read, "or other"

STANTON: "Among other things"?

MORRIS: – "among other things." And so that was really the telling issue for me. Now, I need to admit, too, that I have – I've in my mind tried to figure out whether or not that has been influenced by what I do know is happening in participation in this section 30 planning. And I guess I can't rule out entirely that it has. So that's just a part of disclosure. But under any circumstances, I just don't think that you get to fulfill the anticipated uses of the piece of property in 50 years, that that time frame does not contribute to fulfillment of a comprehensive plan. Even at the time this application was filed, 50 years was a relatively small period of time. It
might have fit better under the 1991 plan in terms of fulfilling it on the long-term basis, because I think that plan did not anticipate – that plan, which was like done in '83 or '88 –

PRIDEMORE: 80.

MORRIS: 80. It didn't – it didn't anticipate how fast things were going to start moving, not only in the county, but in the world around it. So if we had used the 1991 plan, the plan in place in 1991, this particular element might have been better satisfied in terms of the length time it would have taken – Are you trying to get me to stop? (laughter)

LOWRY: Oh, no. Although it does seem to me that you're focusing in on fulfilling the compound policies because of inability of this land to convert to –

MORRIS: For 50 years.

LOWRY: – whereas I believe Commissioner Stanton and Pridemore are focusing on the effect this will have on nearby lands, and their – whether they will be impeded from urbanizing.

PRIDEMORE: And mine would be both, the specific site and the surrounding.

MORRIS: But it's the specific site I'm talking about right now, because that is a specific site that we're dealing about, and it is part of the comprehensive plan. And it is – for I believe in 1994 industrial uses. It just doesn't seem to me that 50 years is a tolerable threshold to use for implementation of a comprehensive plan. So for that reason and for that reason only – I also have to say again, I do believe that this – everything I have read in this application with the exception of the 50-year time horizon, is – does indeed pass the test of the standards, but that one – I don't think it does on that one.

PRIDEMORE: Additional discussion? Is there an action?

MORRIS: Before we move to something, I need to ask Mr. Lowry a question. Mr. Lowry, we know we are not the last word here. We know we are one step in the long, long journey this application has

had and will no doubt continue to have. In case we get it back, and we are overturned, can we – it comes back to us, at that time can we add conditions of approval? Or if we want to take a shot of conditions of approval, do we have to do it now?

LOWRY: The court's normal practice is to remand and let you decide how to proceed. But the court does have the ability to end it, to say the examiner's decision is upheld and I'm not going to remand. That – there is that risk. You can certainly either go to the conditions now or simply indicate for the record that if you're overturned, you've requested it be remanded. Before you proceed with that, though, there is one additional appeal issue that I don't think has been addressed, and that's whether the examiner erred in concluding that if the solid waste zoning permit criteria are met, the conditional use criteria are met. The argument being that there is more discretion to turn down a CU than a solid waste zoning permit. And you may not want to go there. You certainly can decide the case on the basis of what you've already discussed.

PRIDEMORE: He kind of did a big, brown bear ending on the solid waste zoning permit, just saying that since it complies with the CUP, or since the CUP in his opinion was appropriate, then the SWSP was automatically appropriate, so there's not a whole lot of argument.

LOWRY: There's a huge amount of overlap between criteria's 1 and 3, or excuse me – 1 and 4 and the CU criteria.

MORRIS: I thought he did it back – the other way around. I thought he said because it meets the criteria of the solid waste zoning permit, it meets the criteria for the conditional use permit.

LOWRY: But you have appeal that says that there's – even if it meets the criteria for a solid waste zoning permit, it still can be turned down, because the CU criteria are broader. And I'm not sure they are broader.

PRIDEMORE: So, are you – getting to Commissioner Morris's original comment, one of the things we asked the hearings examiners to do is to include if they are denying, and they would include suggested conditions to us if we were to overturn them, is that something or is that not something that we could do in the highly unlikely event that this were to be appealed further?

MORRIS: Highly unlikely? Dream on? (laughter)

LOWRY: No, it's something that you could do if the – if you didn't have any conditions that were appealed. But if there are some conditions or lack of conditions that relate to issues that were appealed, that you believe should be included…

MORRIS: Do you want me to just tell you what's on my mind?

LOWRY: Sure. Sure.

MORRIS: Here's what's on my mind. What's on my mind is people walking along the unfinished part of 1st Street. And I understand that we have no authority to require that frontage road improvements except along the front; I understand all that. But it seems to me that a nice compromise position – there is county right-of-way, and I did visit the site, and Mr. Lowry, this is not new evidence, this is – there are photographs in the record, there are discussions, there are maps, there's everything, there is county right-of-way there. I just went out to look at it. And I would very much like to see, in the event of eventual approval of this, that the applicant would either do or underwrite the cost of the county putting an asphalt walkway in our right-of-way along the unimproved section of SE 1st. And there's not a lot, because a part of it is improved in – on the western side and this will be improved on the eastern side. But it just doesn't seem to me too much to ask. And it makes me feel better.

LOWRY: The State law is fairly clear that we cannot condition an application on doing off-site improvements. However, an applicant can voluntarily agree to do those. If you add that as a condition, and the applicant challenges it, the applicant will win. If the applicant doesn't challenge it, that's the equivalent of saying the applicant voluntarily agrees to do the improvement.

MORRIS: Thoughts?

STANTON: I haven't spent a whole lot of time on the conditions, specifically, so I'd rather not get into trying to amend them or add to them today. I mean I – it's reasonable what you're suggesting. That condition exists today, actually.

PRIDEMORE: Well in the list of all of the items that I think that this use would -- the negative aspects that this use would have on the area, that's at least one that could be somewhat mitigated, and the safety – pedestrian safety issue. So let's put it in and in the hopes that the applicant will do it.

MORRIS: I'd like to do that. To go along with all the rest of the stuff we're going to appeal.

LOWRY: You're talking about an off-site walkway, not sidewalk?

MORRIS: Yes. We've done that in the past. We've gone out and just built – we did it along 134th, when we had a school there and we didn't have a right to ask for the road to be done, we've just put it in our right-of-way.

LOWRY: Do you have some cross streets between which we'd be talking about? I'm not sure – I mean I assume –

MORRIS: Well, it would be between the western edge of the site and the termination of the westbound sidewalk on the north side of 1st and east of 172nd. The sidewalk, if I remember this, is from 172nd,

moves to the east a ways, not a long ways, but a little ways. And there's a space where there's nothing. And that's across the front of the English property and something else. And then there's this site, and then there's Aphis, and they don't have to do Aphis, but
I don't think they would mind if we had a walkway put in our right-of-way. They'd probably pour it. Then during that part, so that it connected with the rest of the improvement.

PRIDEMORE: This is something you would work out with more resolution –

LOWRY: Yes, I just wanted a description enough so that we could write the conditions.

PRIDEMORE: Other comments? Is there an action?

STANTON: I'm trying to figure out exactly what the action is. That comes back to your question about the CU.

LOWRY: And, again, it's not necessary for you to get into the issue of the CU.

STANTON: So we can just overturn the hearings examiner and deny the solid waste zoning permit?

LOWRY: Based upon A-4 and your discussion on the considerations in B. I'm going to want to get a transcript before we do the resolution.

PRIDEMORE: We're just taking action on the solid waste permit; we're not taking action on the CUP?

LOWRY: You would be reversing the CUP also.

MORRIS: Well, Mr. Chairman, then I move we also overturn the hearings examiner on the conditional use permit. Is that what you want?

LOWRY: No, no. The examiner decided that because the criteria – he found the findings for the solid waste permit were met, that the conditional use permit criteria also were met. Now, since you've overturned him on the solid waste permit, you will automatically overturn him on the CU. You take out the underpinnings for his decision. However, you have an appeal that you could address if you choose to do so that would say "even if we're wrong on our conclusions regarding the solid waste permit, we still would deny this because there's broader discretion under the CU and we don't think that's met." Again, my reading – there's a large overlap between findings A-1 and 4 for the solid waste permit and the CU criteria. So, I'm not sure the argument is a good one.

COMMISSIONER: You're not sure the argument is a good one?

LOWRY: Right, but you may believe there's merit to it and want to make some additional conclusions that even if you're wrong as to the solid waste permit, you would deny this because of the CU criteria. And you haven't discussed the CU criteria at all.

STANTON: You're right. Because I was using the assumption that if there was no solid waste zoning permit, there would be no –

LOWRY: The only reason you do this is if the court were to overturn you on the solid waste permit, and say you erred there. If you said that here's some additional reasons why we're denying the conditional use permit under its criteria, you would have an alternative basis to uphold your decision. I don't think that that's a real strong argument, because of the overlap.

MORRIS: I didn't think a lot about it.

STANTON: I didn't, either.

PRIDEMORE: I didn't either. I followed the actual appeal issues.

LOWRY: Then don't go there.

STANTON: Then don't go there? Thank you. Mr. Chairman, I believe that the hearings examiner both misconstrued the code in his interpretation of the considerations, and also that he didn't give appropriate weight to his considerations that he did conclude were not met. And I am firmly convinced a mistake was made. I can't find that the proposed use meets the test of 18.410.055(A) and, therefore, I would move that we overturn the hearings examiner and deny the application for a solid waste zoning permit and the CU.

MORRIS: I can't second that. I didn't agree with you about the waiting issue and have even said out loud that when it got right down to it, the waiting issues didn't mean nearly so much as which comprehensive plan we were using. So, while I agree with you on the outcome of this, that we overturn the hearings examiner, I don't agree with you on the reasons.

STANTON: Okay, let me just go back and say – Mr. Chairman, I move that we overturn the hearings examiner and deny the application for a solid waste zoning permit.

PRIDEMORE: To make it easier can we include the –

STANTON: -- and CU.

PRIDEMORE: And can we include the additional condition regarding the walkway on 1st.

STANTON: Oh, yes, and include the condition as articulated by Commissioner Morris.

MORRIS: Thank you. I can second that.

PRIDEMORE: So it's been moved and seconded to overturn the hearings examiner and deny the application for solid waste zoning permit and conditional use permit and to add that additional condition language. All those in favor?

MORRIS: Aye.

STANTON: Aye.

PRIDEMORE: Aye. Opposed? Motion passes. That concludes our business today.

STANTON: Just before we leave. Those of you who are here who were sending e-mails and participated in the ad that was in the paper, I just have to let you know that worked exactly opposite of what you intended, in my case. I was professionally offended -- not personally, because I have a very thick skin. But it doesn't work. Actually, I worked harder to try to find the case for the applicant. And I just wanted you to know that for future reference.

MORRIS: I'm glad you said that. I had a particularly nasty one, yesterday. And the gentleman who sent it said something about how he had just learned that this was happening and how surprised he was and that anyone – and that if I voted for this he would work as hard as he could to see that I was never elected again. And I had to think to myself - where have you been, sir, that you just learned about this? There are civic responsibilities that you have as citizens to know what's going on in your world. And the only thing I got out of that email was that he hadn't paid very good attention to his responsibilities as a citizen. I'm glad you said that and I echo it, Commissioner Stanton.

PRIDEMORE: I should employ the thumper rule, but I'll add my comments to that as well. I think your phrase "being professionally offended" is right on. I'm a little thinner skinned than you, probably, because I was somewhat personally offended, as well. It very much --

MORRIS: I was, too. I thought that was just totally unnecessary.

PRIDEMORE: -- It very much worked opposite on me. And my desire – I don't know where people in Clark County have gotten the belief that if they call people names and threaten them, or any of that, that somehow people are going to be more sympathetic to your cause. It doesn't work. It certainly doesn't work with me. And I could go on, but in the interest of the thumper rule, I'll stop there. Business is concluded. We are adjourned.

[HEARING ADJOURNED]

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